

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



75-2066

To be argued by  
RALPH L. McMURRY

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES ex rel. FRANCISCO :  
MARTINEZ, a/k/a TONY CRUZ, :

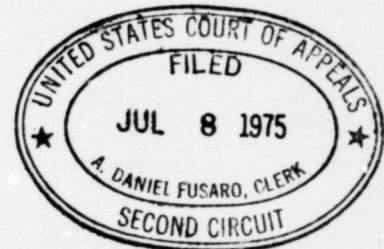
Petitioner-Appellant, :

-against- :

JAMES A. THOMAS, Warden, :

Respondent-Appellee. :  
-----X

BRIEF FOR RESPONDENT APPELLEE



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BRIEF FOR RESPONDENT APPELLEE

Preliminary Statement

Petitioner-appellant appeals from a decision dated April 4, 1975, of the United States District Court for the Southern District of New York, Tyler, J. denying after an evidentiary hearing petitioner-appellant's application for a writ of habeas corpus.

Questions Presented

1. Whether the District Court properly concluded that petitioner was competent to waive counsel and in fact made a competent and intelligent waiver of counsel?

2. Whether the District Court properly concluded that in the circumstances of this case the state trial court properly determined that petitioner waived his right to counsel and was under no constitutional duty to inquire further into petitioner's capacity to waive that right?

3. Whether the District Court properly concluded that the state trial court's denial of a continuance to obtain private counsel on the eve of trial and the trial court's refusal to permit new counsel to intervene in the middle of an on-going trial deprived petitioner of his right to counsel?

#### Statement of Facts

##### A. Summary of Procedural History

Petitioner was convicted on August 12, 1966 after trial by jury in Supreme Court, New York County, of attempted robbery in the first degree, attempted grand larceny in the second degree, assault in the second degree and possession of a dangerous weapon as a felony. On October 4, 1966, petitioner was sentenced to concurrent terms of imprisonment, the largest of which was 7 1/2 to 15 years imprisonment (Gellinoff, J.).

Petitioner's appeal was dismissed as abandoned on April 15, 1968, pursuant to § 535 of the former New York Code of Criminal Procedure. However, petitioner raised the substance of his present claims in a writ of error coram nobis brought in Supreme Court in New York County on which an evidentiary hearing was held in February, 1969, and a decision adverse to petitioner rendered June 9, 1969.\*

Petitioner then filed a petition for a federal writ of habeas corpus on January 10, 1974, alleging, inter alia that (1) he was not permitted trial counsel of his own choosing; (2) he was compelled by the trial judge to act as his own attorney; (3) he was not granted an adjournment for purposes of retaining counsel and locating defense witnesses; and (4) the prosecution and the trial court ought to have committed petitioner for psychiatric examination to determine his competency to stand trial.

The petition was referred by the District Court to Magistrate Goettel, who submitted a report dated June 27, 1974, recommending an evidentiary hearing. The Magistrate concluded

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\*This decision, omitted from petitioner's appendix, is annexed hereto as Exhibit "A" in respondents appendix.

that the state court coram nobis hearing did not meet the "presumption of correctness" requirements of 28 U.S.C. § 2254(d) and went on to question the motive, integrity, and even the intelligence of the state court coram nobis judge. The District Court accepted the Magistrate's recommendation and an evidentiary hearing was held in December, 1974. At the federal evidentiary hearing and on this appeal, petitioner has apparently converted his initial claim that he was incompetent to stand trial into a claim that he was incompetent to waive counsel.

On April 4, 1975, the District Court denied the petition in a twenty-nine page decision.

B. State Court Proceedings

1. Pre-Trial Proceedings

Petitioner was arrested on February 15, 1966, indicted on March 4, 1966, and arraigned on March 18, 1966. At arraignment petitioner was represented by private counsel, Mr. Stephen Gottlieb, who had appeared for him at a court appearance nine days earlier. Counsel was relieved by the Court at petitioner's request on April 1, 1966. Petitioner claimed he relieved Mr.

Gottlieb because of "incorrect advice", and that he discussed with Gottlieb only bail questions, FHT 146, 179, 180.\* Petitioner had been represented by Mr. Gottlieb on another and previous criminal matter. FHT 144.

On April 12, 1966, and April 26, 1966, petitioner's case was called but petitioner was not produced. The case was adjourned each time at the suggestion of the Assistant District Attorney. Stip. ¶ 3.

On May 5, 1966, Faustino Garcia, Esq., appeared on behalf of petitioner and requested an adjournment of two weeks because of a claimed inability to contact petitioner's family over a period of two or three or four weeks. Pet. Ex. 4f, Stip. ¶ 4.

On May 19, 1966, Mr. Garcia was relieved from representing petitioner at petitioner's request, and the Legal Aid Society was appointed. The record shows that petitioner did not complain about the Legal Aid appointment at this time. Petitioner says he had retained Mr. Garcia solely for purposes of

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\*For convenience respondent uses the same reference abbreviations used by the petitioner.

a bail application, and was told by Mr. Garcia that such an application was against the law. Petitioner says he discharged Mr. Garcia because he refused to make a second bail application. Petitioner says he discussed his case with Mr. Garcia two or three times, but discussed nothing other than bail. FHT 147-149, Stip. ¶ 5, Pet. Ex. 4g.

Petitioner had an interview with Mr. Leopold of the Legal Aid Society when the Legal Aid Society was appointed. FHT 11, 149. The Legal Aid file indicates that petitioner refused to supply even the first names of alibi witnesses at this time. Pet. Ex. 5. Mr. Leopold also noted that petitioner gave him several versions as to his whereabouts at the time of the crime. FHT 33. Mr. Leopold does not remember how many times he conducted interviews between May 19, 1966, and the date the trial began on August 4, 1966, FHT 12. However, petitioner says he never saw Leopold during this period. FHT 150.

On June 16, 1966, the case was adjourned with the consent of the Legal Aid Society attorney answering the calendar call. Pet. Ex. 4h. On June 20, 1966, the case was set down for trial on July 5, 1966, with the consent of both sides. Pet. Ex.

41, Stip. ¶ 7. On July 5, 1966, the People announced they were ready. The Assistant District Attorney stated that he had spoken with the petitioner's lawyer and the case was to be ready. The case was marked ready and sent to another part. Stip. ¶ 8, Pet. Ex. 4j. On July 7, 1966, the case was marked ready and passed. The Legal Aid attorney appearing on petitioner's behalf claimed not to have the case on her calendar. The court expressed its belief that someone was on vacation, and said "... somebody will have to take it over." Stip. ¶ 9, Pet. Ex. 4k.

On July 8, 1966, the Legal Aid Society attorney appearing on petitioner's behalf requested an adjournment to August on the grounds that (1) Mr. Leopold, the attorney of record, was on vacation and (2) an investigation was pending. The court said at one point, "Wait a minute. You know this case has been on 13 times. When was the defendant arrested? I mean, you can't keep him in jail." At another point the court said: "Here we have cases from February and we purposely established these parts so that we can dispose of the old cases, that men don't stay in jail." Stip. ¶ 10, Pet. Ex. 4l.

On August 3, 1966, the case was called and the People announced they were ready. Mr. Leopold requested an adjournment of two weeks because of the need to produce a witness and a pending investigation. After scolding Mr. Leopold for not being ready on a jail case, the court stated that it did not think the application for an adjournment was made in good faith. The case was sent out for trial. Pet. Ex. 4m.

## 2. The Trial

On August 4, 1966, the People announced they were ready. Mr. Leopold requested an adjournment for the purpose of continuing and concluding his investigation. Mr. Leopold noted that it wasn't until the previous day that petitioner had given him the names, and then only the first names without addresses of two defense witnesses. Mr. Leopold also announced that his client no longer wanted his services. TT 2-3.

In response, Justice Gellinoff rejected the request for an adjournment, noting that it came at a very late stage in the proceedings. TT 5. The Justice testified that as is frequently the case, the getting of witnesses is merely a proffered excuse for the delay of a trial, and that he was

aware that petitioner did not even know the last names or addresses of these witnesses. FHT 90, 91. Under the circumstances the Justice concluded that the request for an adjournment to obtain witnesses was a delaying tactic. FHT 91. However, the Justice was careful to afford petitioner an opportunity to locate these witnesses, and to adjourn the case for a short time if necessary.\* TT 7, 8, 10, 12, 30, 35, 44, FHT 101. The Court even actively sought to make arrangements to be made to contact his family or witnesses. TT 35, 58, 142. Efforts were in fact made to contact petitioner's family and identify his witnesses, but these were unsuccessful. TT 41, 130, FHT 43. It is questionable whether these "witnesses" ever existed, because petitioner refused even on the eve of trial to give Mr. Leopold any information that might be necessary in locating them. TT 31. Petitioner had also given three different stories concerning his whereabouts at the time of the crime, with three corresponding different sets of "witnesses". FHT 33.

Justice Gellinoff also rejected petitioner's request for an adjournment to obtain his own counsel. He noted that

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\*At one point petitioner indicated he did not want an adjournment to obtain witnesses. TT 31.

petitioner already had had two private counsel and had had plenty of time to obtain a lawyer. He concluded, based on his experience, that the petitioner was attempting to delay his final confrontation with the law. TT 5-7, FHT 88, 102, 104, 107.

Petitioner's version is that he wanted his own lawyer because he didn't "appreciate" Leopold's way of asking him questions and Mr. Leopold "didn't sound too much like a lawyer to me." FHT 152. He declined to say Mr. Leopold was incompetent. FHT 184. Petitioner said Mr. Leopold showed no concern and wasn't prepared. FHT 184.

There is evidence that in the middle of the trial a private lawyer appeared for petitioner, but Justice Gellinoff didn't remember this and it does not appear on the trial record. FHT 114-119.

Faced with the alternative of accepting assigned counsel or representing himself, petitioner elected to represent himself. Indeed, he adamantly insisted on proceeding pro se by refusing assistance of counsel. TT 6, 8, 10, 13, 18, FHT 184-5. This election by his own admission was a tactic, an attempt to bluff his way past Justice Gellinoff. FHT 153, 185.

It is also clear that petitioner made this election with his eyes open. He knew he was charged with attempted robbery; he knew he could go to jail if convicted; he knew the purpose of the trial was to decide if he was innocent or guilty of the charge against him; he had previous experience with the criminal process. FHT 183. He had demonstrated some rationality and awareness of his situation by retaining private counsel earlier in the case. Mr. Leopold warned petitioner of the dangers of proceeding on his own. FHT 48. While petitioner claims he "didn't know the first thing about the law", FHT 186, Mr. Leopold considered petitioner particularly knowledgeable about court procedures, FHT 46, 47 and Justice Gellinoff considered him fully competent to waive any rights, FHT 90, and found that he participated, was rational, displayed a knowledge of procedure, and was able to be alerted to alternatives and to request assistance. FHT 94.

Justice Gellinoff allowed petitioner to represent himself,\* but assigned Mr. Leopold to assist petitioner as "associate counsel". TT 12, FHT 96. This was done to protect petitioner's rights, FHT 97, notwithstanding petitioner's insistence that he wanted no help from Leopold. As Justice Gellinoff

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\*On one other more recent occasion, petitioner also represented himself at his own request in a criminal trial because he knew more about the case than "any lawyer in the world" FHT 190-192.

noted, Mr. Leopold was not picked out of the blue but came into the case already representing petitioner. FHT 100. Throughout the trial petitioner adamantly insisted on representing himself and repeatedly spurned the assistance of counsel directed to advise him.

Petitioner apparently conducted most of the trial himself. Petitioner says he doesn't recall if he ever asked Mr. Leopold for advice during the trial. FHT 185. However, Mr. Leopold says petitioner did ask him questions during the trial. FHT 41. The trial transcript shows Mr. Leopold conferring with petitioner on at least five occasions. TT 33, 49, 112, 138, 141. Petitioner exercised all his peremptory challenges. TT 34, 50, 56. Petitioner cross-examined the complainant, a Mr. Washington, and a police officer. TT 91-93, 99-109. Neither cross-examination, while obviously not that of a professional attorney, was so inadequate as to make it unclear what petitioner was driving at. The same must be said for petitioner's direct examination of his star witness. TT 151, 177. Petitioner got his theory of the case across reasonably well. TT 104-108, 178, 180-191. The Court took affirmative steps to protect petitioner's rights and render his assistance.

For example, the Court explained to petitioner the law of prior crime, TT 114; explained the meaning of a proposed stipulation, TT 112; declined to call a recess at petitioner's request, TT 103; discussed with petitioner whether or not he should take the stand, TT 171-173; and entered numerous motions on his behalf. TT 136, 196-197. Even the prosecutor at one point objected to an answer from the mouth of his own witness. TT 132. Petitioner delivered his own summation. TT 201-204. The jury returned a guilty verdict.

### 3. Sentence

At sentence on October 4, 1966, Justice Gellinoff had before him a probation report indicating petitioner's prior institutionalization at Wassaic and Kings Park over a decade earlier. Pet. Ex. 7. The report also indicated that petitioner had previously been examined at the Psychiatric Clinic in 1959 and found to be "without psychosis" and with a "pathological" personality. Mr. Leopold for the first time requested a psychiatric examination without offering any real reason for the request. ST 8. At the federal hearing he testified that he did this only because of petitioner's several emotional outbursts at trial, but that nonetheless petitioner remained co-

herent. FHT 46. Mr. Segal, a private attorney, appeared and made a similar request because petitioner "didn't understand the nature of this whole thing." This observation was apparently the result of a single interview with petitioner. ST 7, 8. Justice Gellinoff responded as follows:

"The Court watched the defendant perform during the course of his trial; the Court watched the defendant perform here this morning. Insufficient has been shown to warrant the Court's arriving at the conclusion that there is even a question as to this man's ability to understand the nature of the proceedings or to be able to make his defense." ST 9.

The Court then sentenced petitioner.

#### C. Petitioner's Mental History

The medical records of petitioner do not establish petitioner's contentions concerning his mental state in 1966; on the contrary, these records show how elusive and complex is the phenomenon of the human mental state. Petitioner's account (Br. p. 17-20) is misleading.

While it is true that petitioner was classified as an undifferentiated moron at Wassaic in 1951, fifteen years before the 1966 trial at issue (Pet. Br. 17) it is also true that a report entitled "Mental Examination" by one Dr. Hans Benwa, M.D., of Wassaic and dated only two days later, contains these remarks:

"stream is coherent and relevant ...  
well oriented to place and person,  
poorly to time ... Retention and re-  
call good. Insight and judgment fair."  
Pet. Ex. 6a

Similarly, a report from Kings Park Hospital, where  
petitioner was confined from 1954 to 1956, signed by one Dr.  
Riley, M.D., and entitled "Admission Note and Mental Examina-  
tion", contains these remarks:

"Patient was speaking appropriately,  
responsively ... Speech is coherent  
and relevant and normal production ...  
Patient is adequately oriented in all  
three spheres. He is alert, appears  
of average intelligence. Insight  
appears limited and judgment is very  
egocentric."

Pet. Ex. 6b.

A psychiatric progress note from Eastern Correctional  
Facility, dated October 7, 1960, and signed by one Frederick  
Seward, M.D., Supervising Psychiatrist states in part that  
(petitioner) "suffers from no mental disorder at this time".  
Pet. Ex. 6c. A psychiatric report from Attica State Prison,  
dated December 19, 1961, found that petitioner was not psychotic.  
Pet. Ex. 6d.

While it is true that petitioner's Bellevue Report in 1965 indicated a psychotic character disorder with marked sociopathic trends, (Pet. Br. 18) the same report described petitioner as "very manipulative." Pet. Ex. 6e.

The psychiatric evaluation most contemporaneous to petitioner's trial, and therefore of most probative value, was a report from New York City Department of Correction, dated December 27, 1966, 2 1/2 months after petitioner's sentence, and signed by one Jose Herrera, M.D. Pet. Ex. 6f. That report stated as follows:

"On interview this inmate is rather verbal, coherent, and relevant. His stream of thought is sustained and he does not show psychotic or schizophrenic trends at this moment."

To the same effect was a report dated February 3, 1967, some five months after the trial, signed by one Dr. Barall, psychiatrist in charge, Pet. Ex 6f, with an overall impression of simply an "antisocial and manipulative individual." Dr. Barall also wrote, "I conclude that there is no significant mental illness at the present time." Dr. Barall reached similar conclusions in a report dated March 10, 1967. Pet. Ex. 6f. A psychiatric report from the Bellevue records, dated February 11, 1967, describes petitioner's speech as "soft, relevant, logical and coherent." Pet. Ex. 6e.

A report from the Bellevue records dated April 10, 1967, describes petitioner as dangerously suicidal, but also describes petitioner as a man who gives his history in a "lucid and coherent" manner and who has a "large manipulative aspect." Pet. Ex. 6e.

In terms of contemporaneous evidence, it is significant that the persons in major contact with petitioner during the trial or at about that time testified that petitioner was lucid, coherent, and responsive, or at least that nothing occurred or was observed to make them suspect otherwise. (Mr. Leopold, FHT 37-38; Justice Gellinoff, FHT 90-95, ST 8-9).

At the federal evidentiary hearing, petitioner called a psychiatrist in an apparent attempt to introduce some contemporaneous evidence of petitioner's mental state at the time of his trial in 1966. Dr. Augustus Kinzel, who had never seen petitioner before, examined the petitioner for twenty minutes on December 10, 1974, and claimed to have examined all his medical records and "portions" of the trial transcript. On the basis of this information he purported to offer a diagnosis of petitioner's mental state in August, 1966, more than eight years before. On direct examination, Dr. Kinzel claimed that peti-

tioner was suffering from chronic schizophrenia at the time of trial and was incapable of making understanding, knowing, and reasoning decisions of significant import. FHT 58, 71. However, on cross-examination, Dr. Kinzel himself said that as a man of science he has doubts about his diagnoses, and he admitted that those doubts would be increased by the passage of eight years as in this case. FHT 74-75. He further admitted that a person diagnosed as chronic schizophrenic was not necessarily incompetent to stand trial or make his own defense. FHT 74. He stated that Martinez was marginally competent to stand trial. HT 75. It turned out that in fact Dr. Kinzel had not read all the medical records before offering his diagnosis. FHT 78, 79. Notwithstanding all this he still maintained his opinions with a "reasonable certainty". FHT 75, 79.

Petitioner was frequently given psychiatric evaluations in the years following his trial. From the Dannemora records, Pet. Ex. 6g, the following appears in a progress note dated September 18, 1968:

"He indicates today that he has simulated in prison mental symptoms because of dissatisfaction and frustrations of not having been represented by a good lawyer and for having received a harsh sentence, 'I wanted to come here I hear it is a good place'".

A Dannemora Clinical Summary, with a progress note dated December 14, 1970, states:

"This man also is known to be a chronic liar and manipulator and now claims that he was planning to escape and faked being ill and said things to the doctors so they would commit him here as he hoped he might be able to escape from here earlier than from Clinton Prison. This man is not evidencing any symptoms of severe depression or psychosis." (Pet. Ex. 6g).

In the petitioner's records from Clinton Correctional Facility are psychiatric reports dated December 26, 1970; October 23, 1971; and February 12, 1972, all signed by doctors and all indicating "no signs or symptoms of mental disorder" or "without mental disorder". Pet. Ex. 6i.

In sum, it is abundantly clear that petitioner's medical records do not lead to the one-sided inferences suggested by petitioner. On the contrary, a close and fair examination of these records show that they contain conflicting diagnoses and impressions which allows for the drawing of conflicting inferences and conclusions about petitioner's mental state at any particular point in time.

POINT I

THE DISTRICT COURT PROPERLY CON-  
CLUDED THAT PETITIONER WAS COMPETENT  
TO WAIVE COUNSEL AND IN FACT MADE A  
COMPETENT AND INTELLIGENT WAIVER OF  
COUNSEL

Petitioner claims that he did not waive his right to counsel and that he was incompetent to do so. Each of petitioner's supporting arguments is without merit.

A. Affirmative Acquiescence

Petitioner's first argument, that there was no "affirmative acquiescence" sufficient to constitute a waiver, is clearly specious. It is difficult to imagine a case where the "acquiescence" was more "affirmative" than in the instant case. Here petitioner repeatedly spurned his court appointed counsel and adamantly insisted on representing himself.

The adamant rejection of the assistance of assigned counsel, along with the assignment of counsel to assist a defendant proceeding pro se and the behavior of a defendant, are important factors militating in favor of finding a valid waiver of counsel. United States v. Rosenthal, 470 F. 2d 837 (2d Cir. 1972; United States v. Spencer, 439 F. 2d 1047 (2d Cir. 1971); United States v. Duty, 447 F. 2d 449 (2d Cir. 1971);

United States v. Price, 474 F. 2d 1223, 1227 (9th Cir. 1973);  
United States v. Jones, 438 F. 2d 1199 (6th Cir. 1971);  
United States v. Grow, 394 F. 2d 182 (4th Cir. 1968); United States ex rel. Konigsberg v. Vincent, 388 F. Supp. 221 (S.D.N.Y. 1975); United States ex rel. Testamark v. Vincent, 496 F. 2d 641, 643 (2d Cir. 1974).

Petitioner's analysis of this case nowhere alludes to the fact that in this Circuit an accused has an absolute constitutional right to proceed pro se. United States ex rel. Maldonado v. Denno, 348 F. 2d 12 (2d Cir. 1965), cert. den. sub nom. United States ex rel. DiBlasi v. McMann, 384 U.S. 1007 (1966); United States v. Plattner, 330 F. 2d 271, 276 (2d Cir. 1964); United States v. Duty, supra. Indeed, the trial court risked reversal if he did not permit petitioner to proceed pro se. United States v. Plattner, supra.

Petitioner's suggestion (Br. 49) that his case was prejudiced as a result of his proceeding pro se is irrelevant. The law is clear that "respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if makes the choice with eyes open." United States ex rel. Maldonado v. Denno, supra, at 15. That a

defendant's pro se representation turned out to be inadequate and ineffective is irrelevant to the issue of whether the waiver of his right to counsel was knowingly and intelligently made. United States v. Calabro, 467 F. 2d 973, 985 (2d Cir. 1972); United States v. Duty, supra, 450-451; Hodge v. United States, 414 F. 2d 1040 (9th Cir. 1969).

Petitioner asserts (Br. p. 23) that there was no "affirmative acquiescence" because the trial court failed to make any inquiry into petitioner's understanding of the consequences of proceeding pro se or the reasons for the request. This argument is devoid of merit. In view of petitioner's heated adamance, a formal inquiry by the trial court would have been futile. In any event, the federal evidentiary hearing clearly revealed the reason for petitioner's request to proceed pro se. The reason in petitioner's own words was that he hoped by such a request to "bluff" the trial court into an adjournment.\* The record also reveals that petitioner was warned about the dangers of proceeding pro se, and went into the trial with "eyes open". United States ex rel. Maldonado v. Denno, supra; see p. 11, supra.

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\*As the District Court noted, the fact the trial court called this "bluff" does not render the waiver invalid. Op., p. 24.

Petitioner attempts to justify his refusal of assigned counsel with the claim that counsel was unprepared. However, if counsel was unprepared, a large portion of the responsibility was petitioner's. As noted above (pp. 6-9), petitioner was from the very outset uncooperative about supplying names of witnesses or information that could be used to help locate such witnesses. Under these circumstances it is ridiculous to suggest that petitioner's waiver was invalid because of alleged lack of preparation by assigned counsel.\*

B. Petitioner's Competence to Waive his Right to Counsel

Petitioner claims that the standard to be utilized in evaluating his competency to waive counsel is higher than that to be utilized in determining his competency to stand trial by virtue of Westbrook v. Arizona, 384 U.S. 150 (1966) and that under such a standard his waiver of his right to counsel was not "intelligent and competent". Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

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\*Petitioner appears to suggest that his lack of cooperation with his own counsel is unimportant because there was allegedly only one "preliminary" interview (Br. 46-47). The unstated assumption is that Legal Aid Society defense counsel, with their large case loads, must repeatedly take time to beg recalcitrant defendants to offer the most elementary cooperation.

i. Applicable Competency Standard

Petitioner is incorrect when he claims that the standard to be utilized in evaluating a defendants' competency to waive his right to counsel is higher than that to be utilized in determining his competency to stand trial (Br. 24). Westbrook v. Arizona, supra, relied on by petitioner, states no such proposition and states no such standard. Westbrook simply states that where a defendant has been found competent to stand trial after a pre-trial competency hearing, a further hearing or inquiry to determine competency to waive counsel must be held where defendant chooses to proceed pro se.

The Supreme Court never indicated how Westbrook's second competency hearing or inquiry was to differ from the first. If the Supreme Court had intended to announce a new standard in Westbrook, it would surely have announced what that standard was. On the basis of Westbrook, therefore, it is impossible to presume a new competency standard for the waiver of counsel.

Petitioner in effect has invited this Court to adopt the position recently taken by the Ninth Circuit in Sieling v. Eyman, 478 F. 2d 211 (9th Cir. 1973), namely that the standard

for competence to "make decisions of very serious import" is higher than the standard of competence to stand trial. That invitation must for sound reasons be rejected.\*

Petitioner gives no indication as to how, as a practical matter, this new competence standard is to differ from the present standard of competence, except that the new standard should be "higher". Fine differences in levels and degrees of competence, however, may not even be scientifically ascertainable. The uncertainties and tentativeness of psychiatric judgments, a problem long recognized by the Supreme Court, Greenwood v. United States, 350 U.S. 366, 375 (1956), already presents sufficient difficulties without the necessity of compounding them by adding new degrees of competence.\*\*

It is significant that petitioner nowhere indicates why the present mental competence standard is insufficient to determine competence to waive counsel. Petitioner apparently

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\* This Court has previously been asked to follow the Ninth Circuit's lead in United States ex rel. Putmon v. Henderson, 75-2586, argued May 30, 1975, and presently sub judice. The State Attorney General's brief there also urged this Court to reject the Ninth Circuit's approach for essentially the same reasons listed here.

\*\*See generally Note, Incompetency to Stand Trial, 81 Harvard Law Review 454, 459 (1967).

assumes that a person who stands trial faces no decisions of "very serious import" whereas a person who waives counsel faces such decisions. The assumption is an utterly false one. A defendant who is competent to stand trial must make numerous serious decisions, such as whether to go to trial at all, and if so, whether to take the stand. In fact, there is no real basis for supposing that a defendant with the mental competence to stand trial does not also possess the mental competence to waive counsel and proceed pro se.\*

In sum, this Court should reject the Ninth Circuit's approach. No other Circuits have adopted it. One sister Circuit has already rejected it. United States v. Harlan, 480 F. 2d 515 (6th Cir. 1973). The Ninth Circuit's approach has been sharply and persuasively criticized. Note, Competence to Plead Guilty: A New Standard, 1974, Duke Law Journal 149.

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\*This is especially so under then New York law, former Code of Criminal Procedure, § 658, under which the competency standard for standing trial also subsumed a competency for making one's own defense. By contrast, the Arizona competency standard in Westbrook simply subsumed a competency for assisting in one's own defense. The difference is critical, since competency to make one's own defense implies a competence to waive counsel. In any event, as was noted in United States ex rel. Konigsberg v. Vincent, supra, many factors considered in evaluating competency to stand trial are also relevant in evaluating competence to waive counsel and make one's own defense.

## 2. Petitioner's Competency

Regardless of which competence standard is employed, petitioner was clearly competent to waive counsel. Each of petitioner's arguments to the contrary are without merit.

### a. Petitioner's Medical Records

Petitioner complains that the District Court made a faulty analysis of his medical records. However, the gravamen of this complaint is really only that the District Court considered numerous portions of petitioner's records which negate petitioner's contentions and which in petitioner's opinion, therefore, "do not detract significantly from the overall medical history". (Br. 25). It was precisely the overall medical history, however, which the District Court did in fact consider at great length, and its conclusion that the records were "extensive but inconclusive and even conflicting on the issue of petitioner's probable competence to waive counsel and represent himself in 1966" was entirely correct and supported by the evidence. See pp. 14-19, supra. Certainly, its analysis of petitioner's medical history cannot be said to be clearly erroneous.

b. Dr. Gorlicki's Testimony

Petitioner attacks at length what he appears to believe was the District Court's reliance on the testimony of Dr. Gorlicki at the state court coram nobis hearing. In fact, however, the District Court did not rely on this testimony in reaching its conclusion; the Court simply noted that its own independent analysis of the medical records tended to conform to Dr. Gorlicki's conclusions.

c. Petitioner's Demeanor at Trial

Petitioner also asserts that the District Court drew the wrong inferences from petitioner's demeanor at trial. Petitioner asserts that Leopold's description of, inter alia, petitioner's "outbursts" together with carefully selected portions of the trial transcript printed in petitioner's appendix, do not give the "appearance" of "rational" behavior (Br. 30). However, as the District Court noted, the trial transcript as a whole indicated that petitioner appeared to have been rational and observant throughout the trial, a conclusion buttressed by the direct observations of persons (Justice Gellinoff and Mr. Leopold) in most immediate contact with petitioner at the time. The District Judge took the reasonable view that those observations are the best indicator of petitioner's competence at the

time.\* Op. 22

d. Dr. Kinzel's Testimony

Petitioner next argues that the District Court "inexplicably" ignored the evidence given by his psychiatrist witness, Dr. Kinzel, at the federal hearing. The failure of the District Court to accord much weight to this testimony is, on the contrary, very explicable indeed. The District Court clearly doubted that this psychiatrist witness, who purported to offer a diagnosis of petitioner's mental state eight years earlier based on a twenty minute interview and an analysis of some medical records, could safely be afforded much credibility. Op. 7, fn. 10. The law in this Circuit is that such diagnoses are of limited probative value. Petition of Pinto 152 F. Supp. 892 (S.D.N.Y. 1957). Moreover, as the District Court noted, since the witness himself testified that petitioner was not necessarily incompetent to stand trial or to make his own defense, no conclusions could be drawn as to petitioner's competence to waive counsel and proceed pro se.

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\*Petitioner cavalierly dismisses Judge Gellinoff's observations as "self-serving" (Br. 31). It is not explained why petitioner's own testimony is any less "self-serving".

In sum, it is clear that petitioner was competent to waive counsel and in fact made a competent and intelligent waiver of counsel. Certainly in view of all the evidence it cannot possibly be said that the District Court's conclusions were clearly erroneous.

POINT II

THE DISTRICT COURT PROPERLY CON-  
CLUDED THAT IN THE CIRCUMSTANCES  
OF THIS CASE THE STATE TRIAL COURT  
PROPERLY DETERMINED THAT PETITIONER  
WAIVED HIS RIGHT TO COUNSEL AND WAS  
UNDER NO CONSTITUTIONAL DUTY TO IN-  
QUIRE FURTHER INTO PETITIONER'S CAPA-  
CITY TO WAIVE THAT RIGHT

Petitioner claims in Point Two of his brief that the Court erred in concluding that the failure of the trial court to inquire into petitioner's capacity to waive his right to counsel was constitutional. This argument is totally without merit.\*

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\*Even if this argument has merit, it is irrelevant since the District Court found that petitioner was in fact competent to waive counsel and did in fact make a valid waiver. Point One, supra.

At the very outset the District Court correctly identified the applicable legal principles. The District Court ruled that a determination of the validity of the waiver of counsel must be made at the time of the waiver, Johnson v. Zerbst, supra, and that as part of that determination an inquiry specifically into the issue of a defendant's competency to waive counsel is mandated if the defendants' competency is otherwise brought into question. Op. 16-17, Westbrook v. Arizona, supra.

The District Court correctly applied these principles to the facts of the case at bar. The District Court concluded that the trial court made a constitutionally adequate determination that the waiver was proper and that the trial court was under no duty by virtue of Westbrook to hold a separate hearing or inquiry into petitioner's competence to waive counsel. These conclusions were abundantly supported by the evidence.

As the court below noted, there was little, if any, evidence before the trial court at the time petitioner commenced his waiver or even during the trial that he was not competent to make such a waiver. No evidence of petitioner's mental history

was presented to the trial court before sentencing, and during the trial itself there was no reason to suspect such a history since petitioner was lucid and showed an awareness of the trial proceedings. See pp. 11, 13-14 supra.

The fact that petitioner had both private and appointed counsel in itself indicated that he was aware of his right to appointed counsel. Petitioner's behavior at trial, characterized as "outbursts" and relied on so heavily by petitioner as evidence of mental instability, did not impress the court below or the trial court as irrational or suggestive of possible mental aberration. On the contrary the transcript as a whole, and the direct observations of petitioner by Leopold and Judge Gellinoff, clearly pointed to a conclusion that petitioner was mentally stable. See pp. 11, 13-14, 17 supra.

Even at sentence, there was not sufficient evidence to raise a "bona fide" doubt as to petitioner's competency. Pate v. Robinson, 383 U.S. 375 (1966). The evidence before Justice Gellinoff suggesting incompetency was sparse indeed (pp. 13-14 supra). The law is clear that even where considerable evidence of prior mental instability exists a competency inquiry is not necessarily compelled under Pate v. Robinson. United

States ex rel. Roth v. Zelker, 455 F. 2d 1105 (2d Cir. 1972); United States ex rel. Rizzi v. Follette, 367 F. 2d 559 (2d Cir. 1966); Jordan v Wainwright, 457 F. 2d 338 (5th Cir. 1972); Hawks v. Peyton, 370 F. 2d 123, 125 (4th Cir. 1966). The evidence of mental instability before Justice Gellinoff pales in comparison to that before the trial court in Pate v. Robinson.

Since petitioner's competency was never brought into question initially, a separate inquiry into petitioner's competency to waive counsel was not mandated by virtue of Westbrook. In Westbrook and Sieling v. Eyman, supra, the fact that a pre-trial competency hearing was necessary was the critical factor in requiring a further inquiry into competency to waive other constitutional rights. As the Court in Sieling (at 214):

"We think Westbrook makes it plain that where a defendant's competence has been put in issue, the trial court must look further than to the usual 'objective' criteria in determining the adequacy of a constitutional waiver" (emphasis added).

Here the defendant's competence was never put in issue. Here the State's competency standard also subsumed a competency for making a defense. Former C.C.P. § 658. The District Court, therefore, was absolutely correct in concluding that there was no need of another inquiry hearing by virtue of Westbrook to determine competency to waive counsel.

Petitioner complains that the trial court's determination as to the validity of his waiver was not spread upon the record\* and therefore in fact does not exist. This is incorrect.

While a specific inquiry may be preferable in the usual case, United States v. Harrison, 451 F. 2d 1013 (2d Cir. 1971), it is not, as the District Court noted, constitutionally compelled. Johnson v. Zerbst, 304 U.S. at 465; United States v. Rosenthal, 470 F. 2d 837 (2d Cir. 1972); United States v. Duty, 447 F. 2d 449 (2d Cir. 1971). Rather, the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background experience, and conduct of the accused. Johnson v. Zerbst supra, at 464; United States v. Rosenthal, supra; United States v. Calabro, supra; United States v. Plattner, supra. Here,

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\*Other Circuits, in interpreting Boykin v. Alabama, have held that the waivers of specific constitutional rights need not necessarily be spread upon the record. McChesney v. Henderson, 482 F. 2d 1101 (5th Cir. 1973), cert. den. 414 U.S. 1146; Wade v. Coiner, 468 F. 2d 1059 (4th Cir. 1972); Todd v. Lockhart, 490 F. 2d 626 (8th Cir. 1974); Stinson v. Turner, 473 F. 2d 913 (10th Cir. 1973).

as a result of its extensive dialogue with, and observations of, petitioner, the Court was clearly under the impression that petitioner was a reasoning, competent person who was deliberately stalling his final confrontation with the law. Moreover, in view of petitioner's adamance on proceeding pro se, a formal determination on the record would have been futile. Clearly, under all these circumstances there was as a practical matter a constitutionally adequate determination that petitioner had waived counsel, even though not formally articulated at the outset. Such a determination was, of course, in fact articulated clearly at the sentencing stage when Justice Gellinoff made his specific observations on petitioner's behavior. See p. 14 supra.

#### POINT III

THE DISTRICT COURT PROPERLY CON-  
CLUDED THAT THE STATE TRIAL COURT'S  
DENIAL OF A CONTINUANCE TO OBTAIN  
PRIVATE COUNSEL ON THE EVE OF TRIAL,  
AND THE TRIAL COURT'S REFUSAL TO PERMIT  
NEW COUNSEL TO INTERVENE IN THE MIDDLE  
OF AN ON-GOING TRIAL, DID NOT DEPRIVE  
PETITIONER OF HIS RIGHT TO COUNSEL.

Petitioner's last claim is that the District Court erred in concluding that petitioner was not deprived of counsel.

by the trial court's denial (on the eve of trial) of a continuance to obtain private counsel and by the trial court's refusal to permit new private counsel to intervene in an ongoing trial on his behalf. This argument is clearly devoid of merit.

An accused has a right to counsel of his own choice, but this right is subject to the necessities of sound judicial administration. United States v. Arlen, 252 F. 2d 491, 494 (2d Cir. 1958). Petitioner had five months to secure counsel of his own choice. During this period, he had three counsel, two private and one assigned. The case had been dragging on for nearly six months with many adjournments at the request of each side. Petitioner did not have an unlimited time to obtain his own counsel, and the trial court, on the basis of its experience, concluded that the request was a delaying tactic. The right to counsel may not be manipulated by an accused to thwart the orderly processes of the administration of justice. United States v. Morrissey, 461 F. 2d 666 (2d Cir. 1972); United States ex rel. Jackson v. Follette, 282 F. Supp. 993, 995 (S.D.N.Y. 1968), affd. 425 F. 2d 257 (2d Cir. 1970); United States ex rel. Davis v. McMann, 386 F. 2d 611 (2d Cir. 1967); United

States v. Llanes, 374 F. 2d 712 (2d Cir. 1967); United States v. Abbamonte, 348 F. 2d 700 (2d Cir. 1965), cert. den. 382 U.S. 982 (1966); United States v. Arlen, supra.

Petitioner's conclusion that he should have been granted an adjournment to obtain his own counsel is, in the circumstances of this case, tantamount to saying that a trial court must always defer to such a request. This is clearly not the law. Stated in another way, petitioner's position boils down to the proposition that he had a right to a particular lawyer of his own choice, a choice which he could make whenever he got around to it. No defendant has an absolute right to any particular counsel, and the right to counsel can be waived entirely if an accused does not retain an attorney within a reasonable time as set by the trial court. United States v. Tortora, 464 F. 2d 1202 (2d Cir. 1972), cert. den. 409 U.S. 980. Five months was more than enough time to obtain private counsel. United States v. Casey, 480 F. 2d 151 (5th Cir. 1973). Clearly the trial court's decision not to adjourn the case once again or permit a new attorney to come into the case on the fifth day of a seven day trial was a perfectly proper exercise of discretion. The District Court was correct in not disturbing that exercise.

Petitioner's claim that the continuance should have been granted because assigned counsel was allegedly unprepared must be summarily rejected. Claims of unpreparedness would not be a valid basis for a continuance, especially where, as here, the lack of preparation is largely attributable to defendant himself. United States v. Maxey, 498 F. 2d 474 (2d Cir. 1974), pp. 6, 8-9 supra.

CONCLUSION

THE ORDER OF THE DISTRICT COURT  
SHOULD BE AFFIRMED

Dated: New York, New York  
June 30, 1975

Respectfully submitted,

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STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK )

Ralph McMurry

, being duly sworn, deposes and  
says that he is employed in the office of the Attorney  
General of the State of New York, attorney for respondent-appellee  
herein. On the 7th day of July, 1975, he served  
the annexed upon the following named person :

Douglas Fairley, Esq  
Debevoise, Plimpton, Lyons + Geler  
299 Park Avenue  
NY NY

Attorney in the within entitled proceeding by depositing  
a true and correct copy thereof, properly enclosed in a post-  
paid wrapper, in a post-office box regularly maintained by the  
Government of the United States at Two World Trade Center,  
New York, New York 10047, directed to said Attorney at the  
address within the State designated by him for that  
purpose.

Ralph McMurry

Sworn to before me this

7th day of July

, 1975

David P. Scannell  
Assistant Attorney General  
of the State of New York